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On behalf of themselves and others similarly situated

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

WILLIAM USCHOLD and TYRONE  
DANGERFIELD, each individually and on  
behalf of others similarly situated,

Plaintiffs,

v.

NORTHSTAR MEMORIAL GROUP, et al.,  
Defendants.

Case No. 3:18-cv-01039-JSC

**NOTICE OF MOTION; AMENDED  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

**[Declaration of Allyssa Villanueva;  
Declaration of Na'il Benjamin;  
Declaration of JoAnna Brooks; and  
Proposed Order filed concurrently  
herewith]**

**Date:** September 19, 2019  
**Time:** 9:00am  
**Courtroom:** F, 15th Floor  
**Judge:** Hon. Jacqueline Scott Corley

PLEASE TAKE NOTICE that, on Thursday September 19, 2019 at 9:00 a.m., or as soon  
thereafter as may be heard, in Courtroom F of the San Francisco Courthouse of the U.S. District  
Court for the Northern District of California, located at 450 Golden Gate Avenue, 15th Floor, San

1 Francisco, California 94102, Plaintiffs WILLIAM USCHOLD (“Mr. Uschold”) and TYRONE  
2 DANGERFIELD (“Mr. Dangerfield”)(collectively “Plaintiffs”) and Defendants NORTHSTAR  
3 MEMORIAL GROUP; NORTHSTAR MEMORIAL GROUP D/B/A CHAPEL OF THE  
4 CHIMES; CHAPEL OF THE CHINES AND NSMG SHARED SERVICES LLC, D/B/A/  
5 NORTHSTAR MEMORIAL GROUP SHARED SERVICES LLC (collectively “Defendants”)  
6 (all together, “the Parties”) jointly will and hereby do move this Court for an order:

- 7 1. Conditionally certifying the Settlement Class, defined as all non-exempt employees of  
8 Defendants employed in California during the Class Period except any employee who  
9 has individually adjudicated his/her claims from January 17, 2014 through the date on  
10 which the Court grants Preliminary Approval;
- 11 2. Preliminarily approving the Settlement Agreement submitted concurrently herewith;
- 12 3. Appointing Plaintiffs as the Class Representatives for the Settlement Class;
- 13 4. Appointing Na’il Benjamin and Allyssa Villanueva of Benjamin Law Group, P.C. as  
14 Class Counsel for the Settlement Class;
- 15 5. Approving the form and content of the proposed Class Notice Packet submitted  
16 concurrently with this Motion;
- 17 6. Approving the Notice procedure set forth in the Settlement Agreement;
- 18 7. Approving Simpluris as class claims administrator;
- 19 8. Directing that Notice be given to Settlement Class members; and
- 20 9. Scheduling a final fairness hearing.

21  
22 This Motion is made on the grounds that:

- 23 a. The Settlement Class meets all of the requirements for class certification for purposes  
24 of settlement pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil  
25 Procedure;
- 26 b. The Settlement Agreement is fair, adequate, and reasonable as required under Rule  
27 23(e) of the Federal Rules of Civil Procedure;

- 1 c. Plaintiff and his counsel are adequate to represent the Settlement Class as required by  
2 Rule 23(a)(4) and (g) of the Federal Rules of Civil Procedure;  
3 d. The notice procedures and related forms comport with all relevant due process  
4 requirements and the requirements of Rule 23(c)(2)(B) of the Federal Rules of Civil  
5 Procedure; and  
6 e. Based on the foregoing, notice should be directed to Settlement Class members and a  
7 final fairness hearing should be scheduled.

8 This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities included  
9 below, on the Declaration of Allyssa Villanueva, Esq. and proposed order filed concurrently  
10 herewith, and all accompanying exhibits, all papers currently on file with this Court, and such  
11 further evidence and arguments as may be presented at hearing.

12  
13 Dated: August 12, 2019

Respectfully submitted,

14  
15  
16 BENJAMIN LAW GROUP, PC.

17  
18  
19 By



20 NA'IL BENJAMIN, ESQ.

21 Attorney for Plaintiffs  
22 WILLIAM USCHOLD and  
23 TYRONE DANGERFIELD  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiffs and Class Representatives William Uschold and Tyrone Dangerfield (“Plaintiffs” or “Class Representatives”) respectfully request that this Court preliminarily approve a proposed class action and representative action settlement set forth in the Settlement Agreement (hereafter “Agreement”) with Defendants NSMG Shared Services, LLC (“NSMG” or “Defendant”)(erroneously named in the Complaint as Northstar Memorial Group; Northstar Memorial Group d/b/a Chapel of the Chimes, Chapel of the Chimes and NSMG Shared Services, LLC d/b/a Northstar Memorial Group Shared Services). NSMG has agreed to pay a Gross Settlement Amount (“GSA”) of Two Million, Two Hundred Thousand Dollars and Zero Cents (\$2,200,000.00) to compromise disputed wage and contract claims.

The Agreement is non-reversionary and provides more than \$5,000.00 to each class member (on average) on a gross basis. This is an excellent result for the class given that the most viable class claims are narrowly defined, the factual and legal issues are complex, and this case was vigorously defended by experienced and skilled defense counsel.

As explained in further detail herein, the Agreement represents a fair, adequate, and reasonable compromise of disputed claims. Defendant presented several defenses to Plaintiffs’ claims. Defendant contends that there was no unlawful deductions or collection of wages and that it paid commissions in a lawful manner. Defendant contends that it paid wages for all hours worked and all wages due at the time of separation. Defendant contends that it fulfilled its legal obligations to reimburse necessary and reasonable expenses. And Defendant contends that Plaintiff’s claims are ill-suited for class treatment because Plaintiff’s claims are not typical of other employees, and because individualized inquiries would predominate over common questions of law and fact.

Although Plaintiffs and their counsel prepared to litigate this case through class certification and, ultimately, to trial, there were risks in going forward with litigation, both



on the merits and in terms of class certification. Despite being faced with a formidable defense, Plaintiffs have secured an excellent seven-figure settlement for the class.

For the reasons discussed herein, the Agreement warrants this Court's preliminary approval because: (1) the class meets all the requirements for class certification for settlement purposes under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure; (2) Plaintiffs and proposed Class Counsel will adequately represent the class; (3) the Agreement bears all requisite indicia of fairness, reasonableness, and adequacy as required by Rule 23(e)(2); (4) the proposed notice procedure and related forms comport with all Rule 23 and due process requirements; and (5) Plaintiffs' request for attorney fees and costs is reasonable and in line with established authority and precedent in similar cases. Thus, this Court should grant Plaintiffs' motion in its entirety, direct that notice be given to all class members, and schedule a final approval hearing.

## **II. SUMMARY OF THE LITIGATION**

This action was originally filed in Alameda County Superior Court on January 17, 2018, alleging five state law claims against five business entities as follows: (1) unlawful collection of wages ; (2) unauthorized deduction of wages; (3) failure to reimburse business expenses; and (4) failure to pay wages; in addition to a fifth claim for violation of the unfair competition law codified in the California Business and Professions Code. Declaration of Allyssa Villanueva ("Villanueva Declaration") ¶ 2.

On February 16, 2018, Defendant NSMG SHARED SERVICES, LLC ("NSMG") removed the action to this Court under the Class Action Fairness Act ("CAFA") asserting that it is the only properly named Defendant. Notice of Removal [Dkt No. 1] Plaintiffs filed a Motion to Remand but withdrew that motion after evaluating the bases for removal. [Dkt Nos. 10 and 18].

The Parties participated in two mediations with Tripper Ortman, a retired trial lawyer and partner from the international law firm, Seyfarth Shaw. Villanueva Decl. ¶ 3. The Parties also conducted discovery in advance of both mediations. *Id.* The first mediation was on October 24, 2018. *Id.* The first day of mediation was unsuccessful. *Id.* However, the Parties conducted additional discovery, including hours of informal interviews of the named Plaintiffs, a key

1 defense witness with direct knowledge of the facts relating to Plaintiffs' allegations, as well as  
2 non-party witnesses. Villanueva Decl. ¶ 4. The parties then spent many months in discussions  
3 and negotiations regarding the proposed new plaintiffs, new claims of fraud and failure to pay  
4 overtime wages, and the terms of a second mediation. *Id.* at ¶ 5. The Parties engaged in  
5 extensive informal individual and class discovery for the exclusive purpose of participating in a  
6 second mediation with the new claims included. *Id.* at ¶ 6.

7 The Parties then scheduled a second day of mediation and attempted to settle the case on  
8 February 5, 2019. Villanueva Decl. ¶ 11. The Parties continued to engage in discovery including  
9 document exchange and witness interviews to assess their positions for mediation. *Id.* at ¶¶ 7-10.  
10 9. The documents exchanged in discovery revealed an increased number of 429 putative class  
11 members with around 50% classified as outside sales and 50% classified as inside sales and  
12 around 81 were classified as both outside and inside sales during their employment in the class  
13 period with Defendant. *Id.* at ¶ 9. The February 2019 mediation was also unsuccessful and  
14 focused mainly on the outside sales exemption issue. Villanueva Decl. ¶¶ 12 and 14.

15 Based on the record and assessment, Plaintiff valued the case to be at least \$9 Million and  
16 Defendant contended there was no exposure. *Id.* at ¶ 13. Defendant presented numerous  
17 arguments and defenses to class certification and liability. Plaintiffs learned during informal  
18 discovery that the disputed commission structure was not in existence until 2017, and that the  
19 company had some written commission agreements, written sales policies and weekly  
20 commission statements. *Id.* at 13(b). Plaintiffs also learned that Defendant had conducted  
21 training on its commission structure within the first six months of its rollout. *Id.* The disputed  
22 exposure period for Plaintiffs' strongest claims was greatly reduced. For those who were  
23 classified as exempt Outside Salespersons, Defendant maintained that they were all properly  
24 classified, and contended that proving otherwise was expected to be an uphill battle. *Id.* at 13(b).  
25 Defendant also presented evidence of policies prohibiting off the clock work. In addition,  
26 Defendant was able to demonstrate it provided expense reimbursement for travel time and cell  
27 phone use for some potential class members, which would have made class certification a  
28 significant challenge. *Id.* at 13(b).

1 The Parties continued to negotiate after the last Case Management Conference, and  
 2 ultimately reached an agreement in early March 2019. Villanueva Decl. ¶ 7. At all times, the  
 3 Parties' remained adverse, their negotiations were non-collusive, and at arm's length. Villanueva  
 4 Decl. ¶ 17.

5 Plaintiffs filed a Notice of Settlement on March 8, 2019. [Dkt No. 36] Plaintiffs now  
 6 submit the Settlement Agreement to this Court for approval. Villanueva Decl. ¶ 19, Ex. A.  
 7 Plaintiffs will file a stipulation to amend the pleadings attaching a First Amended Complaint that  
 8 will add Plaintiffs Tiana Naples and Jose Almendarez, as well as new claims of: breach of  
 9 contract; fraud- intentional misrepresentation; fraud-false promise; failure to pay minimum  
 10 wages; and a PAGA claim; and facts supporting these amendments. Agreement ¶ 19; 33, Ex. B.

### 11 **III. SUMMARY OF THE SETTLEMENT AGREEMENT**

#### 12 **a. Net Settlement Fund Allocation**

13 The Agreement provides for a Gross Settlement Amount of \$2,200,000 ("GSA").  
 14 Agreement at ¶ 37. The Net Settlement Amount ("NSA") shall be calculated by deducting from  
 15 the GSA (i) the LWDA PAGA Payment (\$33,000.00); (ii) Class Counsel's attorneys' fees as  
 16 approved by the Court (up to 1/3 of the GSA or \$736,200.00); (iii) costs as approved by the Court  
 17 (not to exceed \$20,000.00); (iv) the Settlement Administrator's costs and fees as approved by the  
 18 Court; (currently quoted by Simpluris to be between \$8,000 and \$11,000 as the class action  
 19 settlement administrator); (v) Defendant's estimated share of applicable payroll taxes to be paid  
 20 on the individual settlement payments, including but not limited to FICA and FUTA (currently  
 21 estimated to be approximately \$64,633.38); and (vi) the Court approved Service Awards in the  
 22 amount of \$2,000.00 per named Plaintiff.

#### 23 **b. Calculation of Individual Settlement Payments**

24 Each class member that does not affirmatively opt out will receive a pro rata share of the  
 25 NSA based on (a) each Class Member's Total Individual Workweeks; (b) divided by the  
 26 aggregate number of Total Class Gross Workweeks of all Class Members; (c) multiplied by the  
 27 value of the Net Settlement Amount. Each Class Member's Total Individual Workweeks will be  
 28 determined by reference to the Company's records, subject to each Class Member's right to

1 submit evidence in support of their respective claims. Agreement ¶ 42. The Settling Parties  
 2 agree that for purposes of settlement that one-third (33.33%) of each Class Member Settlement  
 3 Payment is allocated to wages. The remaining portion of each Class Member Settlement Payment  
 4 shall be allocated one-third (33.33%) to interest, and one-third (33.33%) to penalties. *Id.* at (d).

5 All checks to participating class members not cashed within 180 days of mailing will be  
 6 voided. Agreement ¶ 45. None of the settlement funds shall revert to Defendant. Agreement ¶  
 7 37. The Agreement provides more than \$5,000.00 to each class member (on average) on a gross  
 8 basis. Villanueva Decl. ¶ 20.

### 9 **c. Dispute Resolution**

10 If a Class Member wishes to dispute the information on the Notice, including his or her  
 11 Total Individual Compensation, the Class Member may so notify the Settlement Administrator  
 12 and must produce supporting evidence to the Settlement Administrator. Agreement ¶ 47. Any  
 13 such dispute and accompanying documentation must be submitted in writing no later than sixty  
 14 (60) calendar days from the date on which Notice is mailed. *Id.* NSMG and Class Counsel will  
 15 review their records and provide information to the Settlement Administrator in response to any  
 16 such disputed claims. *Id.* Defendant's Counsel and Class Counsel will cooperate in attempting to  
 17 informally agree upon and resolve any such disputes. *Id.* The Settlement Administrator will  
 18 evaluate the evidence submitted by the Class Member and make the decision as to which dates  
 19 should be applied. *Id.*

20 The dispute-resolution procedure will also apply in cases, if any, where a person believes  
 21 that he or she was mistakenly excluded from the list of Class Members. Agreement ¶ 48.

### 22 **d. Release of Claims**

23 Settlement Class members who do not request exclusion shall release NSMG, and each  
 24 and all of its respective past and present parents, subsidiaries, affiliated companies and  
 25 corporations, and each and all of their respective past and present owners, directors, officers,  
 26 managers, employees, general partners, limited partners, principals, agents, insurers, reinsurers,  
 27 shareholders, attorneys, advisors, representatives, predecessors, successors, divisions, joint  
 28 venturers, assigns, or related entities, and each and all of their respective executors, successors,

1 assigns and legal representatives (collectively, the “Released Parties”), from all claims, charges,  
 2 complaints, liens, demands, causes of action, obligations, damages and liabilities, whether known  
 3 or unknown, that each Class Member had, now has, or may hereafter claim to have against the  
 4 Released Parties, arising at any time during the Class Period that were or could have been pleaded  
 5 based on the facts and allegations alleged in the First Amended Complaint filed in the Lawsuit or  
 6 arising out of the same nucleus of operative facts. Agreement ¶¶ 96-103.

7 **e. Notice Procedures**

8 No later than twenty (20) calendar days after the Preliminary Approval Date, Defendant  
 9 shall provide the Settlement Administrator an electronic file(s) containing the following  
 10 information for each Class Member: (1) full name; (2) last-known address; (3) social security  
 11 number (if known); and (4) the gross individual workweeks from January 17, 2014 through the  
 12 date of preliminary approval for work done as a commissioned sales employee in the state of  
 13 California. Agreement ¶ 69. All Notices will be individually calculated to state the precise  
 14 amount that the specific Class Member is to receive. For purposes of this Settlement, a  
 15 “workweek” includes any week in which a Class Member worked at least one scheduled shift. It  
 16 does not include weeks of inactive employment. Agreement ¶ 69.

17 No later than forty (40) calendar days after Preliminary Approval Date, the Settlement  
 18 Administrator shall mail the Notice as approved by the Court, to Class Members, by United States  
 19 first class mail, postage prepaid. Agreement ¶ 71, Ex. A. The mailing of the Notices described  
 20 herein shall be deemed sufficient notice under the law. Agreement ¶ 72. In order to provide the  
 21 best notice practicable, the Settlement Administrator will run the list of all Class Members  
 22 through the United States Postal Service’s National Change of Address database (“NCOA”)  
 23 before mailing the Notice. Agreement ¶ 73. If an envelope from the mailing of the Notice is  
 24 returned with forwarding addresses, the Settlement Administrator will re-mail the Notice to the  
 25 new address within three (3) business days. Agreement ¶ 74. In the event that a Notice is  
 26 returned to the Settlement Administrator by the United States Postal Service because the address  
 27 of the recipient is no longer valid, i.e., the envelope is marked “Return to Sender,” the Settlement  
 28 Administrator shall perform an appropriate, customary and lawful database search in an effort to

ascertain the current address of the particular Class Member in question (a “skip trace”) and, if such an address is ascertained, the Settlement Administrator will re-send the Notice within three (3) business days of receiving the newly ascertained address. Agreement ¶ 75. A Class Member or Class Counsel may also contact the Settlement Administrator to provide updated address information. Agreement ¶ 76.

If, despite the Settlement Administrator’s reasonable efforts, no updated address is obtained, the Notice shall be sent again to the Class Member’s last-known address. Agreement ¶ 77. The Settlement Administrator shall resend the Notice to any Class Member who contacts the Settlement Administrator or Class Counsel and requests that a Notice be re-sent. Agreement ¶ 78. Any subsequent mailings of a Notice following the original distribution of the Notice as a result of a returned Notice or a Class Member request shall not alter the deadlines to object or opt-out of the Settlement Agreement. Agreement ¶ 79.

#### **f. Payment Procedures**

No later than ten (10) calendar days of the Effective Date, the Settlement Administrator shall mail all Class Settlement Payments. The face of each check sent to Class Members shall clearly state that the check must be cashed or deposited within one hundred eighty (180) calendar days. All Class Settlement Payments distributed by the Settlement Administrator will be accompanied by a cover letter stating words in bold to the effect that “the check must be cashed or deposited within one hundred eighty (180) days or it will become void.” Agreement ¶ 44.

Like with the Class Notice Process (*see* Section XIII(A) below), if a check is returned undeliverable to the Settlement Administrator, the Settlement Administrator will make all reasonable efforts to locate the Class Member’s correct address. If a Class Member’s NSA Payment check is not cashed or deposited within one hundred twenty (120) calendar days following the date of mailing of said check following mailing of said check, the Settlement Administrator will send the Class Member a letter or a postcard informing him or her that unless the check is cashed or deposited within the remaining two months, it will expire and become non-negotiable, and offer to replace the check if it was lost or misplaced but not cashed. Agreement ¶ 45.

1 **g. Deduction of Payroll Taxes**

2 Defendant's estimated share of applicable payroll taxes to be paid on the individual  
 3 settlement payments, including but not limited to FICA and FUTA will be deducted from the  
 4 GSA. During the negotiations of the settlement in this matter, the Parties discussed the tax  
 5 treatment of any settlement and the costs associated with same. Declaration of JoAnna L. Brooks  
 6 In Support of Amended Motion for Preliminary approval of Settlement ("Brooks Decl.") ¶ 2.  
 7 When determining the GSA, Defendant estimated the cost of handling the preparation of the  
 8 settlement checks, and particularly the payment of the employer's share of payroll taxes that  
 9 would be owed on the portion of the settlement allocated to the payment of wages. *Id.* As the  
 10 parties worked towards a final gross settlement amount, Defendant estimated the costs for the  
 11 payment of the employer's share of payroll taxes could be as high as \$100,000, depending on the  
 12 net settlement for distribution to the participating class members. *Id.* The Parties agreed the GSA  
 13 would cover the employer's share of taxes and would constitute the maximum sum paid by  
 14 Defendant. *Id.* Similar to other deductions from the gross settlement amount to cover attorneys'  
 15 fees/cost, claims administration, service awards, and PAGA payments, Defendant agreed to  
 16 contribute more to the gross settlement amount with the expectation that the employer taxes  
 17 would be deducted from the fund. Brooks Decl. ¶ 3.

18 Based on the breakdown of the settlement, the net settlement fund that the parties intend  
 19 to distribute to the participating class members is approximately \$1.4 Million. Brooks Decl. ¶ 4.  
 20 Of the \$1.4 Million, a third will be allocated to wages, \$466,667, and subject to the payment of  
 21 payroll taxes. Based on current tax rates applicable to Defendant's operations in California, the  
 22 employer's share of federal and state taxes owed on this amount will be approximately  
 23 \$64,633.38, which is less than the \$100,000 that Defendant estimated and contributed to the  
 24 settlement fund to cover the employer's share of payroll taxes. *Id.* The class will be receiving a  
 25 benefit of an additional \$35,000 due to the negotiated amount of approximately \$100,000 being  
 26 needed to cover these payroll costs.

27 In the class action context, it is not uncommon for the parties to negotiate and include the  
 28 payment of the employer's share of taxes in the payment of the gross settlement fund. Brooks



Decl. ¶ 5. There is the certainty of knowing that all of the funds for payment of the class have been addressed in one sum versus having unexpected additional costs. *Id.* If the Parties understand and agree that the gross settlement has been increased to cover this amount, and there is complete transparency in the class notice, there is no detriment to class members by having this amount deducted from the gross fund. It is no different than having the claims administration fees deducted by agreement of the parties. Brooks Decl. ¶ 5. Therefore, the Parties believe this is a fair and reasonable approach to the payment of the employer's share of payroll taxes to be paid from the GSA.

#### h. Attorney's Fees Consistent with Ninth Circuit Precedent

The Agreement provides for up to 33 1/3% of the GSA in attorney fees, and for reimbursement of actual litigation costs. Agreement ¶ 59. These provisions are fair, adequate, and reasonable, and fall within the range of reasonable fees in the Ninth Circuit. It is well settled that "the primary basis of the fee award remains the percentage method," and 30% is within the established reasonable range for common-fund cases. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir.2002); *see, e.g., Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) ("[t]he typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value").

Courts in Northern District of California evaluate the complexity of the matter, and the overall nature of the work performed by attorneys when deciding the appropriate amount of contingency fees to award. Here, Plaintiffs' counsel faced the challenge of certifying a class action comprised of employees assigned to work at different job sites, with different managers, and under different compensation systems. Defendant used a complex and uncommon commission scheme after 2017 that had the appearance of being lawful. Defendant previously used a commission plan that was consistent with the oft-used "draw" system, but still susceptible to legal challenge. The interrelationship between these commission plans, coupled with the varying types of sales employees across several locations, presented factual and legal difficulties that are not common to most wage and hour class action lawsuits.



1 Defendant has dozens of California properties where it employs potential class members  
2 that were hired as commission-earning sales employees. Each of these locations has different  
3 managers, and those managers had different practices with respect to scheduling, overtime, and  
4 the use of “commission-only” employees. These locations also had employees that began  
5 working for Defendant under its old “draw” system, and continued to work for Defendant under  
6 its new PIPP system. As pled, Defendant’s PIPP commission plan includes a Gate which uses  
7 points as a quota. These employees earn commission based on their performance against the  
8 Gate/quota.

9 Plaintiffs’ counsel spent dozens of hours studying Defendant’s PIPP and Gate system.  
10 Defendant’s employees – including Plaintiffs – did not fully understand the PIPP and Gate, how it  
11 worked, and how much they were to earn under various scenarios. Plaintiffs’ counsel had to  
12 overcome several misunderstandings about the various components of the PIPP and Gate to  
13 ensure counsel could sufficiently evaluate the facts and legal issues under the California Labor  
14 Code. These complexities were compounded, in part, because Defendant also employs  
15 “commission only” employees that previously worked under a PIPP and Gate system, but had a  
16 change in status. This meant that they had pay stubs that reflected different methodologies  
17 relating to their attendance, hourly rate, quotas, the removal of the quotas, and wages relating  
18 only to whether they earned an actual commission in a pay period.

19 At minimum, this case involved three different compensation plans (Draw, PIPP/Gate,  
20 and Commission Only), an analysis of whether these categories of employees satisfied the  
21 standards for exempt sales professionals with respect to varying outside and inside sales duties,  
22 and the need to be clear about the different types of sub classes and the ability to defeat a motion  
23 for summary judgment based on the competing facts with respect to the sales duties of each type  
24 of employee.

25 Additionally, given that Defendant utilized the “draw” commission system before 2017,  
26 and that some employees hired after 2017 worked on a commission-only plan, Plaintiffs counsel  
27 needed to thoroughly assess the ability to certify a class of PIPP/Gate employees with claims  
28

1 consistent with those pled in the currently pending complaint, and the proposed First Amended  
 2 Complaint. Given that the potential class size is more than 400 employees, and numerous  
 3 employees stopped working for Defendant before the PIPP/Gate system was implemented,  
 4 Plaintiffs' counsel needed to employ a rigorous analysis regarding the number of potential class  
 5 members, number of sub classes, and number of people in each sub class, and which areas of law  
 6 applied to some of these categories, but not others.

7 In sum, unlike the standard wage and hour class action where a large number of  
 8 employees fit into the same basic category, this case involved numerous complex and potentially  
 9 competing employment issues. Plaintiffs' counsel needed to analyze misclassification issues  
 10 (exempt v. non-exempt) and which sales employees across numerous locations were entitled to  
 11 overtime and meal and rest breaks; the calculation of commissions and whether employees were  
 12 deprived of all wages paid when applying the complicated Gate points; whether employees from  
 13 different locations were actually similarly situated and eligible for inclusion in the proposed class;  
 14 and whether employees expressly or tacitly agreed to each commission system regardless of the  
 15 date they signed their offer letters.

#### 16 **IV. LEGAL STANDARDS**

17 Cases brought as class actions may only be settled, compromised or dismissed with  
 18 court approval. Fed. R. Civ. P. 23(e). Approval of a class action settlement involves a two-  
 19 step process. First, counsel for the parties submit the proposed terms of settlement, and the  
 20 court makes a preliminary fairness evaluation. At this stage, the court examines the terms  
 21 for overall fairness, and in so doing balances the following factors:

- 22 • The strength of the plaintiffs' case;
- 23 • The risk, expense, complexity and likely duration of further litigation;
- 24 • The risk of maintaining class action status throughout the trial;
- 25 • The amount offered in settlement;
- 26 • The extent of discovery completed;
- 27 • The stage of the proceedings;
- 28 • The experience and views of counsel;

- The presence of a governmental participant; and
- The reaction of the class members to the proposed settlement.

*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1996); *Molski v. Gleich*, 318 F.3d 937, 956 (9th Cir. 2003).

Second, if the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, the court should direct that notice be given to class members of a final fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement. *Newberg on Class Actions* (4th Ed. 2008) § 11.25; *Manual for Complex Litigation Third* § 30.41 (2009).

In reviewing a request for preliminary approval of a class action settlement, this Court is not charged with conducting a detailed analysis of the proposed settlement. Rather, its task is to determine whether the proposed settlement is within the "range of reasonableness," and whether it is appropriate to notify the class of the terms of the settlement and schedule a formal fairness hearing. *Newberg on Class Actions* (4th ed. 2008) § 11.25. According to the *Manual for Complex Litigation*:

If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the Class Members of a Formal Fairness Hearing, at which evidence may be presented in support of and in opposition to the settlement.

*Manual for Complex Litigation*, 3rd, § 30.44 (2009).

The strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal may vary. The court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid subject only to any objections that may be raised at a final hearing.

*Newberg on Class Actions* (4th ed. 2008) § 11.26.

1 In making the preliminary fairness evaluation, a court should be mindful of the  
 2 "strong presumption" that an agreed-upon settlement is fair. *Cotton v. Hinton*, 559 F.2d  
 3 1326, 1331 (5th Cir. 1977).

4 "In most situations, unless the settlement is clearly inadequate, its acceptance and  
 5 approval are preferable to lengthy and expensive litigation with uncertain results." *National*  
 6 *Rural Tele. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004). Further, in  
 7 approving a settlement,

8 [t]he court need not "reach any ultimate conclusions on the contested issues of  
 9 fact and law which underlie the merits of the dispute, for it is the very uncertainty  
 10 of outcome in litigation and avoidance of wasteful and expensive litigation that  
 induce consensual settlements."

11 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992) (quoting  
 12 *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)).

## 13 V. ARGUMENT

### 14 a. This Court Should Certify the Class for Settlement Purposes Only

#### 15 i. This Case Satisfies All Four Requirements of FRCP Rule 23(a)

16 A class action may be certified under the Federal Rules of Civil Procedure if all four  
 17 prerequisites under Rule 23(a) are established and at least one subsection under Rule 23(b)  
 18 is met. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1250 (11th Cir. 2004). Plaintiffs assert that  
 19 the proposed Settlement Class meets these requirements.

20 When a court has not yet entered a formal order determining that the action may be  
 21 maintained as a class action, the parties may stipulate that it be maintained as a class action  
 22 for the purpose of settlement only. *Newberg on Class Actions* (4th ed. 2002) § 11.27. In  
 23 this case, NSMG has agreed not to oppose Plaintiffs' motion to maintain this action as class  
 24 action for the purposes of settlement only. Agreement ¶¶ 29, 34, and 35.

#### 25 1. Numerosity

26 Rule 23(a) requires numerosity, typicality of the class representatives' claims,  
 27 adequacy of representation, and commonality (predominance of common issues). Fed. R.  
 28 Civ. P. 23(a); see also *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1019 (9th Cir. 1998).

1 First, with respect to numerosity, the Settlement Class is comprised of over 429 individuals  
2 and is therefore numerous enough that joinder of all Settlement Class members is  
3 impracticable. Villanueva Decl. ¶ 9.

## 4 **2. Typicality**

5 Second, Plaintiffs' claims are typical of the Settlement Class. The typicality  
6 standard is "whether other members have the same or similar injury, whether the action is  
7 based on conduct that is not unique to the named plaintiffs, and whether other class  
8 members have been injured by the same course of conduct." *Hanan v. Dataproducts Corp.*,  
9 976 F.2d 497, 508 (9th Cir. 1992) (citation and internal quotations omitted). Plaintiff's  
10 claims and those of the Settlement Class members are based on the same alleged course of  
11 conduct (deducting and collecting wages, failing to pay all wages at time of separation,  
12 failing to reimburse business expenses, fraud, breach of contract), and they are alleged to  
13 have suffered similar injuries (fraud, breach of contract, failure to pay wages, reasonable  
14 reimbursement, and penalties).

## 15 **3. Adequacy**

16 Third, Plaintiffs will adequately represent the Settlement Class. Plaintiffs are  
17 represented by counsel who is qualified to conduct the litigation. Villanueva Decl. ¶¶ 21-  
18 25; Declaration of Nail Benjamin. In addition, Plaintiffs' interest in the litigation is not  
19 antagonistic to the Class; in other words: there is no disabling conflict of interest that might  
20 hinder the prosecution of the action on behalf of the Class. In fact, their interests in the  
21 litigation are co-extensive with those of the Class. Plaintiffs were employed by NSMG  
22 during the Class Period, have allegedly been injured in the same manner by the same  
23 practices or course of conduct as the other Settlement Class members, and seek the same  
24 relief as the other Settlement Class members. Plaintiffs further agreed to serve as class  
25 representatives and has retained qualified counsel, demonstrating their commitment to  
26 bringing about the best possible results for the benefit of the Class.

## 27 **4. Commonality**

28

Fourth, common questions of law and fact predominate here because this action focuses on NSMG's alleged uniform course of conduct with regard to commission agreements and compensation for employees under such agreements. Plaintiffs allege that Defendant fraudulently promised and misrepresented terms of employment inducing them to sign commission agreements, Defendant's compensation under the commission agreements violates various Cal. Labor Code sections and the commission agreement itself, and Defendant failed to pay reasonable reimbursement for business-related expenses.

**ii. This Case Satisfies At Least One Requirement Under FRCP Rule 23(b)**

Finally, with respect to the requirements of subsection (b), Rule 23 (b)(3) allows class certification where common questions of law and fact predominate over individual questions and class treatment is superior to individual litigation. As stated above, this case involves allegations of common policies and practices regarding entering into commission agreements, terms of the commission agreements, compensation, and unreimbursed expenses. As for superiority, given the relatively small damages per individual claimant, coupled with the large class size, class treatment is superior to individual litigation.

As other courts have found, when assessing these issues of predominance and superiority, the court may consider that the class will be certified for settlement purposes only. *Amchem Products, Inc., et. al. v. George Windsor, et. al.*, 521 U.S. 591, 618-20, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). A showing of manageability of trial is not required. *Id.* The test is "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623; *see* Fed. R. Civ. P. 23(b)(3)(D). The Settlement Class in this case meets that requirement.

The Court should certify the Class only for purposes of settlement.

**b. This Court Should Preliminarily Approve the Settlement Agreement**

As explained more fully below, the proposed Settlement Agreement before the Court in the present dispute meets the criteria for preliminary approval due to the following: it was reached through arms' length negotiation and bargaining, it involved mediation

1 before a respected and experienced mediator, the investigation and discovery in the case  
 2 were sufficient to allow counsel and the Court to act intelligently, and Plaintiffs' Counsel is  
 3 experienced in similar litigation as well as in other complex matters. The Proposed  
 4 Settlement is also fair, reasonable and adequate given the inherent risks of litigation, the  
 5 risks regarding class certification, and the expense and time consumed by litigation.

6 **i. The Settlement is the Result of Serious, Informed, Non-collusive**  
 7 **Negotiations.**

8 The Proposed Settlement presented to the Court for preliminary approval is the  
 9 result of almost one and a half years of litigation, discovery and negotiations between  
 10 Plaintiffs' and Defendant's counsel, which culminated in two days of private mediation.  
 11 Although both mediations failed, the Parties were able to reach a settlement after ongoing  
 12 extensive negotiations.

13 The Parties vigorously debated the proper application of the law and the  
 14 uncertainties posed by unsettled questions at issue in this litigation as described above.  
 15 Each side has strongly advocated its positions concerning the claims and defenses at issue.  
 16 Each side also recognizes that the expense, delay, and uncertainty of the result after trial and  
 17 appeal present the danger that an ultimate victory by either side may be of less value than  
 18 the Proposed Settlement. Counsel for Plaintiffs and Defendant submit that the Proposed  
 19 Settlement is in the best interests of all parties.

20 **ii. The Settlement is Fair Considering the Potential Damages Per Class**  
 21 **Member, And The Value And Risks Relating To Further Litigation.**

22 When considering the fairness of settlement, courts consider the strength of a  
 23 plaintiffs' case as well as the risk, expense, complexity and likely duration of further  
 24 litigation. *See Hanlon v. Chrysler Corp.*, 150 F.3d at 1026. The Parties acknowledge that  
 25 the facts of this case are disputed. Plaintiff contends that NSMG is liable for failure to pay  
 26 wages by unlawful and unauthorized deductions and collections through its commission  
 27 agreements; liable for breach of contract; liable for unpaid wages due to misclassification,  
 28 liable for off the clock work, liable for meal and rest violations; liable for fraud based on its  
 false promises and misrepresentations in entering into commission agreements; and liable

1 for failure to reimburse business expenses. NSMG denies all liability for such claims,  
2 maintains that its commissioned employees are properly compensated for all wages in  
3 conjunction with its payment policies, maintains that it did not make misrepresentations or  
4 false promises in entering into the commission agreements on individualized basis with  
5 each employee, maintains it properly classified its Outside Sales Persons as exempt,  
6 maintains it paid its employees for all hours worked, maintains it provides lawful meal and  
7 rest breaks, and maintains that it reimbursed all business expenses, and maintains that these  
8 claims are not certifiable due to the individualized facts and questions relating to each  
9 individual employee.

10 There was a significant range of exposure in this case on each of the various claims  
11 asserted. Villanueva Decl. ¶ 13. On each of the claims, Defendant presented numerous  
12 arguments and defenses to class certification and on the merits. Plaintiffs estimated meal  
13 period exposure between \$1 Million to \$5 Million based on respective averages of one (1)  
14 missed meal and one (1) rest period per class member per week and five (5) missed meal  
15 periods and five (5) missed rest periods per class member per week during the class period  
16 calculated on a daily wage based on the average hourly rate of \$11.00/hour. However,  
17 Defendant had a compliant meal period policy and produced time detail records showing  
18 substantial compliance. This claim therefore was limited mainly to the Outside Salespeople  
19 who were classified as exempt, and which Defendant maintained were properly classified,  
20 thereby creating a greater challenge on class certification. Even if misclassified (which  
21 Defendant did not concede), Defendant maintained that very few Outside Sales Persons  
22 worked daily shifts in excess of five hours to trigger a meal period. The Parties'  
23 negotiations considered varying degrees of evidence on both sides with respect to the  
24 number of employees that worked shifts in excess of five hours thereby triggering a right to  
25 a meal period. Similarly, Plaintiffs estimated rest period exposure between \$1 Million to \$5  
26 Million based on respective averages of one (1) missed meal and one (1) rest period per  
27 class member per week and five (5) missed meal periods and five (5) missed rest periods  
28



1 per class member per week during the class period calculated on a daily wage based on the  
2 average hourly rate of \$11.00/hour. Defendant presented the same defenses.

3 Plaintiffs estimated \$1 Million in exposure for unpaid wages for alleged  
4 misclassification. This was calculated based on assumption of 350 class members who  
5 were paid at a daily rate of \$92.00 instead of the average hourly rate of \$11.50, plus  
6 overtime. This claim also includes statutory waiting time penalties of up to 30 days which  
7 is estimated at \$2,670.00 per class member. Defendant presented evidence that Outside  
8 Salespeople work more than 50% of their work time out in the field as a means to meet the  
9 exemption. Proving otherwise may have required individualized inquiries instead of being  
10 subject to common proof. Accordingly, settlement negotiations accounted for the risk that  
11 this claim may not have been certified under the circumstances, and therefore any potential  
12 for recovery could be reduced accordingly.

13 Plaintiffs estimated the exposure for off the clock work to be around \$750,000.00.  
14 The estimate is based on around \$345.00 in unpaid overtime and doubletime per week per  
15 Family Service employee who worked "on call". Plaintiffs estimated an additional \$2  
16 Million in exposure for hourly sales person based on assumption of only six (6) months'  
17 employment. Defendant was able to show it had policies prohibiting off the clock work and  
18 procedures for reporting all working time. There were some employees who were reporting  
19 their on call time and getting paid. Again, settlement negotiations required consideration  
20 for the extent to which this evidence made common proof and potential class recovery for  
21 the entire proposed class more challenging.

22 Plaintiffs estimated that liability for unreimbursed personal vehicle use was  
23 approximately \$2 Million based on an average of 750 miles per month for six (6) months  
24 per class member. Plaintiff believes that 750 miles per month is a low average given that  
25 many class members worked in excess of 6 months an even in excess of one year.  
26 However, Plaintiffs learned that Defendant provided stipends to some employees who were  
27 required to use their personal vehicle for company business, and maintained a policy  
28 allowing for reimbursement of mileage.

1 With respect to Plaintiffs cell phone claims, Plaintiffs learned that Defendant  
2 provided stipends for cell phones for some employees and land lines accessible to others to  
3 perform their job duties. This created a potential challenge to recovering damages on behalf  
4 of the entire class as well as the potential for individualized inquiries instead of proof by  
5 common evidence.

6 Plaintiffs estimated the total exposure to be at least \$3 Million based on an average  
7 of \$4,000.00 in unpaid commission per month for three (3) months of employment for at  
8 least 300 class members. Defendants presented arguments and evidence during the informal  
9 discovery process that the actual amount in controversy was under \$1 Million. The  
10 commission structure at issue was not rolled out until the Spring of 2017 which meant that  
11 the issues relating to the Gate and PIPP did not cover the entire proposed class period and  
12 that those damages calculations could not pre-date early 2017. In addition, Defendant  
13 provided evidence of some written commission agreements, sales policies and weekly  
14 commission statements. Defendant also presented evidence of some training on the  
15 commission structure. Defendant maintained that there was no fraud and that its  
16 commission structure was transparent and understood by its employees. Defendant argued  
17 that the dispute was limited to a brief period of time as the commission structure was being  
18 rolled out and employees were still learning about the structure. The disputed evidence  
19 created risks for class certification.

20 In the face of these and other uncertainties, Plaintiffs' Counsel believes that the  
21 agreed-upon settlement fairly compensates the Class Members for wages and penalties  
22 allegedly owed. As this Court is undoubtedly aware, the uncertainty of the outcome of a  
23 class certification motion and ultimate adjudication of the facts (if there is one) here places  
24 both parties in a position of significant risk. The parties are also informed by an awareness  
25 of the extreme expenditures in time and money required to litigate to conclusion class-wide  
26 issues regarding the application of California's wage and hour laws. If this case were  
27 certified, it would then need to proceed to trial. In a case of this size, post-trial and  
28 appellate proceedings would be likely to occur, which would surely drag the case even

1 further into the future. When facing a distant and unsure resolution of the allegations in this  
2 action, a swift, sure and substantial settlement is all the more reasonable. The Parties  
3 assessed and valued their respective risks and liabilities during and aside from mediation  
4 negotiations to reach the proposed settlement. *See Villanueva Decl.* ¶¶ 3-17.

5 **iii. Sufficient Discovery and Investigation Has Occurred to Assess the**  
6 **Fairness of the Settlement.**

7 Another factor considered for purposes of approving a settlement is the extent of  
8 discovery completed. *See Hanlon*, 150 F.3d at 1026. The Parties have conducted thorough  
9 discovery and investigation into Plaintiffs allegations and NSMG's defenses. *See*  
10 Villanueva Decl. ¶¶ 3-17. Over the course of the litigation, the Parties obtained sufficient  
11 information to assist with analyzing their respective positions. *See Agreement* ¶¶ 22-23.  
12 Accordingly, sufficient investigation and discovery has been conducted for the Parties to be  
13 well-informed of the nature and the extent of the Class claims, and to enable both sides to  
14 fully evaluate the settlement proposal for adequacy, fairness and reasonableness.

15 Defendant produced thousands of pages of documents in response to Plaintiffs'  
16 document requests, and as evidence supporting Defendant's defenses. The Parties  
17 interviewed key witnesses, debated the data relating to the number of potential class  
18 members, the total number of class wide work weeks based on the number of potential class  
19 members, complex calculations regarding sales commissions and sales quotas under  
20 Defendant's PIPP/Gate system, analyzed hire dates and commission agreements, and  
21 analyzed Defendant's sales practices and how those practices impacted work hours and  
22 overtime claims. These issues were debated and analyzed extensively with respect to  
23 different locations throughout the Bay Area, including the extent to which the evidence  
24 overlapped or could be distinguished.

25 **iv. The Settlement Amount and Method of Allocation are Fair.**

26 Another factor is the amount offered in settlement. *See Hanlon*, 150 F.3d at 1026.  
27 Based on Plaintiffs' analysis of the data and witness testimony, the claims in this case  
28 created an exposure ranging between \$9M and \$15M before costs and attorneys' fees

1 following class certification and trial. Villanueva Decl. ¶ 10. The gross settlement amount  
2 is approximately 13% to 22% of that exposure, which is more than reasonable given the  
3 risks involved in this case.

4 As courts have observed, "simply because a settlement may amount to only a  
5 fraction of the potential recovery does not in itself render it unfair or inadequate.  
6 Compromise is the very nature of settlement." *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 618  
7 (C.D. Cal. 1979). In this case, Plaintiffs consider the settlement to be significantly more  
8 than a "fraction," particularly considering the various potential complications, dangers and  
9 pitfalls that proceeding would entail.

10 Courts recognize that the reasonableness of a settlement is not dependent upon it  
11 approaching the potential recovery plaintiffs might receive if successful at trial. *See In re*  
12 *Omnivision Tech., Inc.*, 2008 WL 123936 (N.D. Cal. Jan. 9, 2008); see also *Nat'l Rural*  
13 *Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("well settled  
14 law that a proposed settlement may be acceptable even though it amounts to only a fraction  
15 of the potential recovery"); *Officers for Justice v. Civil Serv. Comm.*, 688 F. 2d 615, 628.  
16 (9th Cir. 1982) (it is "the complete package, taken as a whole rather than the individual  
17 component parts, that must be examined for overall fairness").

18 Based on the numerous risks in continuing with litigation, which are detailed above,  
19 Plaintiffs in the current action chose to obtain for the Class a certain award of significant  
20 value when compared to the value of the overall claims. The amount accepted is fair and  
21 reasonable. *See, e.g., Omnivision* 2008 WL 123936 at \*5; *In re IKON Office Solutions*  
22 (E.D. Pa. 2000) 194 F.R.D. 166, 183-84 (approving settlement totaling \$116 million  
23 although plaintiffs estimated their claims to be worth more than \$1 billion dollars, or about  
24 11.6% of the requested amount for damages); *In re Global Crossing Securities and ERISA*  
25 *Litigation* (S.D.N.Y. 2004) 225 F.R.D. 436, 460 (approving partial settlement of \$325  
26 million, far below the "tens of billions" estimated in damages by the plaintiffs).

27 In terms of the method of allocation, each class member who does not affirmatively  
28 opt out will receive a pro rata share of the NSA based on (a) each Class Member's Total

Individual Workweeks; (b) divided by the aggregate number of Total Class Gross Workweeks of all Class Members; (c) multiplied by the value of the Net Settlement Amount. Each Class Member's Total Individual Workweeks will be determined by reference to the Company's records, subject to each Class Member's right to submit evidence in support of disputed claims. Agreement ¶ 42. None are singled out for special treatment (other than Plaintiffs, who are requesting an enhancement payment for their work on the case and the risks they took in being the named plaintiffs).

**v. Plaintiffs' Enhancement Award Is Appropriate.**

The \$2,000 Enhancement Award to the named Plaintiffs is fair and not the result of improper self-interest. Federal courts in California frequently award enhancement payments to lead plaintiffs for their efforts in prosecuting cases. *See, e.g., Glass v. UBS Financial Services, Inc.*, 2007 WL 221862, \*16 (N.D. Cal. 2007) (approving payments of \$25,000 to each named plaintiff); *In re Heritage Bond Litigation*, 2005 WL 1594403, \*18 (C.D. Cal. 2005) (awarding incentive payments of between \$5,000 and \$18,000); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) (awarding \$50,000 to a lead plaintiff). Courts have thus recognized that the important goals of the class action vehicle will best be served if individuals are given reasonable incentives to step forward and represent their co-workers.

In this context, a payment to the named Plaintiffs of \$2,000.00 out of a total \$2,200,000.00 settlement is both fair and reasonable. Mr. Uschold and Mr. Dangerfield assisted Plaintiffs' counsel with investigation of the claims by, among other things, participating in multiple telephone conferences to discuss NSMG's policies and practices and their experiences as employees, identifying key witnesses and additional potential class members, and producing documents needed to assist counsel with assessing the bases and strength of the claims. Plaintiffs also risked being responsible for Defendant's costs if the case was lost and having their future employment prospects damaged by the fact that they are named plaintiffs in a class action lawsuit against a former employer.

1 Plaintiffs propose adding Plaintiffs Naples and Almendarez. Both Naples and  
 2 Almendarez are named as plaintiffs in the proposed First Amended Complaint. They also  
 3 assisted in the same ways as Uschold and Almendarez, and they represent class members  
 4 and sub-class members that are not otherwise adequately represented by Uschold and/or  
 5 Dangerfield.

6 **vi. The Amounts Allocated to Attorneys' Fees and Costs Should be  
 Approved**

7 Plaintiffs' Counsel will request attorneys' fees not to exceed \$736,200.00 (1/3 of the  
 8 Total Class Action Settlement Amount) and litigation expenses not to exceed \$20,000.00,  
 9 based on the award achieved on behalf of the class, the complexities of the factual and legal  
 10 issues involved with Defendant's commission system and varying categories of potentially  
 11 exempt and non exempt employees, and the time, skill, and experience required to analyze  
 12 and navigate these issues effectively and successfully for Plaintiffs and the class. *See*  
 13 *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997)  
 14 (attorney fee award of 33.3% based on maximum settlement value in a claims-made  
 15 settlement).

16 **vii. Both State Officials Will Be Provided With The Opportunity To  
 Review And Consult Regarding The Settlement.**

17 Because this case was removed under the Class Action Fairness Act, NSMG will be  
 18 required to provide notice of the Proposed Settlement and its terms to the California  
 19 Attorney General and appropriate officials in California and each state where any Class  
 20 Member resides. 28 U.S.C. § 1715. If these entities have any concerns with the Proposed  
 21 Settlement, the Court will be apprised of those concerns prior to the final fairness hearing.

22 **viii. Plaintiff's Counsel Have The Requisite Experience.**

23 Another factor considered in determining the fairness of a settlement is the  
 24 experience and views of counsel. *Hanlon*, 150 F.3d at 1026. Plaintiffs' Counsel have  
 25 collectively practiced law for over 16 years, have focused a substantial amount of their  
 26 practice on employment law including class and representative actions under the California  
 27 Labor Code, have obtained millions of dollars on behalf of plaintiffs in employment cases  
 28 as well as general litigation matters, and have litigated dozens of class actions and

representative actions during their careers (both plaintiffs matters and defense matters). Villanueva Decl. ¶¶ 21-25; Declaration of Na'il Benjamin. Based on this combined experience, Plaintiffs' Counsel strongly believe that the settlement is fair and appropriate given all factors involved.

**ix. The Degree of Opposition to the Proposed Settlement.**

Another factor when considering fairness is the reaction of the class members. *See Hanlon*, 150 F.3d at 1026. Once all Class Members have received notice of the terms of the Proposed Settlement, the Court will be able to consider the reaction of the Class at the final fairness hearing. Due to the fairness and adequacy of the Proposed Settlement, the Parties do not anticipate any opposition.

**c. This Court Should Approve the Proposed Notice and Related Forms**

Due process and judicial interpretation of the notice provisions of Fed. R. Civ. P. 23(c) requires that notice be provided to class members by the best reasonable method available. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974); *Cartt v. Superior Court*, 50 Cal. App. 3d 960 (1975).

When the named parties of a class action reach a proposed settlement, class members must be notified of the terms of the proposed settlement so that they have an opportunity to consider the terms of the settlement. *Newberg on Class Actions* (4th ed. 2002) § 11.30. Notice of a proposed settlement must inform class members (1) of the nature of the pending litigation; (2) of the settlement's general terms; (3) that complete information is available from court files; and (4) that any class member may appear and be heard at the final fairness hearing. *Id.* at § 11.53.

To assess the adequacy of the proposed notice, the Court must consider both the notice's mode of dissemination and its content. *Id.* The nature and extent of class notice of a proposed settlement are left to the discretion of the trial court judge. *Id.* Notice is designed to be only a summary of the litigation and the settlement and need not be unduly specific. *Id.*



1 In this case, the proposed Class Notice provides a description of the litigation, a  
2 description of the settlement, instructions for participating in or opting out of the settlement,  
3 instructions for objecting to the settlement, details on the final settlement approval hearing,  
4 contact information for class counsel, and instructions for obtaining court records. *See*  
5 Class Notice (Agreement ¶ 71, Ex. A). The Notices will also be personalized for each Class  
6 Member by listing their specific recovery amount.

7 The proposed mode of dissemination of the Class Notice is also adequate. NSMG  
8 has agreed to pay (out of the Total Class Action Settlement Amount) a third-party claims  
9 administrator to send the Notice Packet by first class mail to the last known address of each  
10 Class Member (which will be verified by a check of the National Change of Address  
11 database). Such notice is the best notice practicable under the circumstances of this action.  
12 The names and last known addresses of virtually all Class Members can be identified  
13 through a careful search of NSMG's employment records.

14 If a Notice is returned with a forwarding address, the Administrator will re-mail the  
15 Notice to the new address. If a Notice is returned without a forwarding address, the  
16 Administrator will conduct a skip trace to locate the correct address and, if a new address is  
17 found, forward the Notice to that address. These notice procedures are reasonable to ensure  
18 that class members are notified of the settlement and of their rights under the settlement and  
19 that they are paid appropriately under the terms of the Settlement Agreement.

20 **d. This Court Should Schedule a Final Fairness Hearing**

21 The last step in the settlement approval process is the fairness hearing, where  
22 Settlement Class members who timely submit objections to the Agreement may be heard,  
23 and this Court makes a final determination about the propriety of the Agreement. Based on  
24 the timetables for giving notice, submitting claims and making objections to the Agreement,  
25 Plaintiff requests that the fairness hearing in this case be scheduled on or before July 19,  
26 2019.

27 ///

28 ///



1 **VI. CONCLUSION**

2 For the reasons discussed above, the Proposed Settlement Agreement is fair,  
3 adequate, and reasonable, and in the best interests of the Settlement Class. Plaintiffs  
4 requests that the Court grant preliminary approval of the Proposed Settlement, confirm  
5 Class Counsel and the Class Representative as requested, authorize the mailing of the  
6 proposed Notice and Claim Form to the members of the Settlement Class, and schedule a  
7 final fairness hearing.

8 Dated: August 12, 2019

Respectfully submitted,

9 BENJAMIN LAW GROUP, PC.

10 By   
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